SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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GREENTREE REALTY, LLC,

Petitioner/Plaintiff,

- against -

THE VILLAGE OF CROTON-ON-HUDSON, THE VILLAGE BOARD OF TRUSTEES OF THE VILLAGE OF CROTON-ON-HUDSON, THE VILLAGE OF CROTON-ON-HUDSON ZONING BOARD OF APPEALS, and DANIEL O'CONNOR, in his official capacity, as the VILLAGE BUILDING INSPECTOR,

Index No. 05-11872
(Action 1)

Assigned Judge:
Hon. Francis A. Nicolai

Respondents-Defendants.

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VILLAGE OF CROTON-ON-HUDSON,

Plaintiff,

- against –

Index No. 05-22176
(Action 2)

NORTHEAST INTERCHANGE RAILWAY, LLC and GREENTREE REALTY, LLC,

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO TOLL THE STATUTORY DISCONTINUANCE PERIOD

Statement of Facts

On September 1, 2005, Metro Enviro Transfer, LLC ("Metro Enviro") ceased construction and demolition debris (C&DD) transfer station operations at 1A Croton

Point Avenue, following more than one-and-a-half years of litigation, which ended with the Court of Appeals' ruling that the Village of Croton-on-Hudson properly refused to renew Metro Enviro's special permit on the grounds of persistent substantial violations of the permit. The site at 1A Croton Point Avenue is owned by Greentree Realty, LLC ("Greentree") and, at the time, was leased by Metro Enviro. C&DD transfer operations have not been conducted at the site since September 1, 2005.[1]

Some time prior to July 29, 2005, Northeast Interchange Railway, LLC ("NIR") reached an agreement with Allied Waste North America, Inc. to acquire ownership of Metro Enviro, including its lease with Greentree of 1A Croton Point Avenue. (NIR affirmed this fact in its notice of exemption to the federal Surface Transportation Board.) Shortly afterward, in September 2005, NIR applied to the Westchester County Solid Waste Commission for a hauler's license for the purpose of operating a C&DD facility at 1A Croton Point Avenue. (Gerrard Aff. ¶ 3) Around the same time, NIR applied for a permit from the New York State Department of Environmental Conservation ("DEC").

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1. The Village refers the Court to the Affirmation of Michael B. Gerrard and the Affidavit of Janine King, filed along with this Memorandum of Law in Opposition to the Motion to Toll the Statutory Discontinuance Period, for a detailed recitation of the facts. The Gerrard Affirmation is cited in this Memorandum of Law as "Gerrard Aff. ¶ __"; the King Affidavit as "King Aff. ¶ __."

Neither NIR nor Greentree, however, applied to the Village of Croton-on-Hudson for a special permit, even though this Court's decision of August 25, 2005 indicated one was necessary to resume waste transfer operations at the site. In November 2005, the chief executive officer of NIR told the Village Manager that NIR did not need a special permit, and indicated that it would commence C&DD operations at 1A Croton Point Avenue once it received its approvals from the Solid Waste Commission and DEC. (Gerrard Aff. ¶ 5)

Therefore, as soon as the Solid Waste Commission issued a hauler's license to NIR, the Village applied to this Court for an order enjoining NIR from resuming C&DD operations at 1A Croton Point Avenue without first obtaining, at a minimum, a special permit from the Village. The Village's application was adjourned repeatedly, each time at the request of Greentree and/or NIR. The last extension of the return date was to March 21, 2006. This Court decided the application promptly and, on April 27, 2006, issued a preliminary injunction requiring NIR to obtain a special permit before commencing waste transfer operations in the Village. (Gerrard Aff. ¶ ¶ 5-6)

The Village expected to get an application for a special permit soon after, but it did not. Indeed, it did not receive an application until July 5, 2006, almost simultaneously with this motion. The Village was so accommodating as to keep the office open beyond closing time in order to accept the application and put it on the agenda of the Board of Trustees' July 10, 2006 meeting. (King Aff. ¶ 4) That night, the Board of Trustees referred the matter to the Planning Board, as required by the

Village Zoning Code. (King Aff. ¶ ¶ 8-9)

Despite the Village's expedited handling of the application, it is virtually certain that the application process cannot be completed in accordance with the Croton-on-Hudson Zoning Code and New York State Village Law before September 1, 2006.

Argument

According to the Croton-on-Hudson Zoning Code, a nonconforming use "[s]hall not be reestablished if such use has been discontinued *for any reason* for a period of one year or more or has been changed to or replaced by a conforming use. *Intent to resume a nonconforming use shall not confer the right to do so.*" § 230-53.A(3) (emphasis added). This zoning provision is unambiguous: once a nonconforming use ceases for one year – for any reason – the use may not resume.

In their motion papers, Greentree Realty, LLC ("Greentree") and Northeast Interchange Railway ("NIR") concede that a construction and demolition debris (C&DD) transfer station is a nonconforming use at 1A Croton Point Avenue, and they concede that the nonconforming use will have been discontinued for a year on August 31, 2006. (Steinmetz Aff. ¶ 8; Gunshor Aff. ¶ 16) In seeking to "toll" the discontinuance period – which the motion papers imprecisely refer to as an "abandonment period" – Greentree and NIR rely on little more than these concessions and their claims that they will lose a valuable property right. There is, however, no legal basis upon which the Court can toll the discontinuance period, and their motion

must be dismissed.

POINT I

NEW YORK COURTS STRICTLY ENFORCE ZONING PROVISIONS THAT PROHIBIT THE OPERATION OF A NONCONFORMING USE AFTER THE USE HAS BEEN DISCONTINUED FOR A FIXED PERIOD – IRRESPECTIVE OF AN INTENT OR EFFORTS TO RESUME THE USE DURING THE LAPSE PERIOD.

The Court of Appeals and Appellate Division have consistently enforced discontinuance periods similar to the Croton provision quoted above – irrespective of the property owner's intent or efforts to continue the nonconforming use. This policy logically flows from the well-settled principle that "[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination." 550 Halstead Corp. v. Zoning Board of Appeals of the Town/Village of Harrison, 1 N.Y.3d 561, 562, 772 N.Y.S.2d 249, 250 (2003). Accord, Pelham Esplanade, Inc. v. Board of Trustees of the Village of Pelham Manor, 77 N.Y.2d 66, 70, 563 N.Y.S.2d 759, 761 (1990) (referring to "the law's traditional aversion to nonconforming uses. The policy of zoning embraces the concept of ultimate elimination of nonconforming uses, and thus the courts favor reasonable restriction of them.").

In Toys "R" Us v. Silva, 89 N.Y.2d 411, 421, 654 N.Y.S.2d 100, 106 (1996), the discontinuance statute had a provision almost identical to the provision in the

Croton statute, that "Intent to resume active operations shall not affect" the determination whether a nonconforming use has been discontinued. The Court of Appeals found that language is "unique" and "goes even one step further," and it rejected the property owner's argument that the zoning statute must be interpreted in favor of the landowner. The Court of Appeals ruled that the statutory language was unambiguous in deeming the owner's intent irrelevant and that the discontinuance provision had to be enforced. The Court went on to say:

> [P]ublic policy specifically supports termination of nonconforming uses, and the [discontinuance statute] itself seeks to achieve "a gradual remedy" for "incompatible" nonconforming uses. As we have stated in a related context: "It has been said in New York that a zoning ordinance must be 'strictly construed' in favor of the property owner * * *. By way of counterpoint, however, it has been said, with equal conviction, that the courts do not hesitate to give effect to restrictions on nonconforming uses * * *. It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses."

89 N.Y.2d at 421-22, 654 N.Y.S.2d at 106 (citations omitted).

Even in cases where the discontinuance statute did not have the specific intent language included in the Croton-on-Hudson provision (*i.e.*, "Intent to resume a nonconforming use shall not confer the right to do so."), the Courts have consistently

ruled that the effect of a statute providing that a nonconforming use that is discontinued for a fixed period may not be resumed, is "to automatically foreclose any inquiry as to the owner's intent to abandon" or resume the use. Sun Oil Co. v. Board of Zoning Appeals of the Town of Harrison, 57 A.D.2d 627, 628, 393 N.Y.S.2d 760, 762 (2d Dep't 1977), affirmed, 44 N.Y.2d 995, 408 N.Y.S.2d 502 (1978). Accord, Darcy v. Zoning Board of Appeals of the City of Rochester, 185 A.D.2d 624, 586 N.Y.S.2d 44 (4th Dep't 1992); Spicer v. Holihan, 158 A.D.2d 459, 460, 550 N.Y.S.2d 943, 944 (2d Dep't 1990); Swartz v. Wallace, 87 A.D.2d 926, 929, 450 N.Y.S.2d 65, 67-68 (3d Dep't 1982) ("the inclusion of a specified time period, reasonable in length, such as here, conclusively forecloses any further inquiry concerning discontinuance of a nonconforming use once nonuse for the requisite period is established").

That Greentree and NIR have been making efforts to resume C&DD operations at 1A Croton Point Avenue does not affect the application of the discontinuance provision. The unambiguous wording of the Croton discontinuance statute leaves no room for exceptions. Nor does settled New York case law.

In the leading Court of Appeals cases enforcing discontinuance statutes, the property owners had been making efforts to resume the nonconforming use before the discontinuance period expired. In Sun Oil Co. v. Board of Zoning Appeals of the Town of Harrison, 57 A.D.2d 627, 393 N.Y.S.2d 760 (2d Dep't 1977), affirmed on memorandum at Appellate Division, 44 N.Y.2d 995, 408 N.Y.S.2d 502 (1978), a gas station that did not operate for more than ten months (the statutory discontinuance

period in Harrison) was ruled to have lost its nonconforming use status even though attempts were being made to sell or lease the property throughout the discontinuance period. And, in Toys "R" Us v. Silva, 89 N.Y.2d 411, 654 N.Y.S.2d 100 (1996), the property owner actually resumed warehouse activities during the discontinuance period, but the Court of Appeals ruled that the minimal warehouse activities were not sufficient to protect the warehouse from losing its prior nonconforming use status. (The statutory language in Toys "R" Us was different, *i.e.*, "the active operation of substantially all the non-conforming uses" must be discontinued.)

Two recent Appellate Division decisions are virtually indistinguishable from the instant case on this issue. In Vite, Inc. v. Zoning Board of Appeals for Town of Greenville, 282 A.D.2d 611, 723 N.Y.S.2d 239 (2d Dep't 2001), the Second Department enforced a discontinuance statute even though the property owner had been making attempts to continue the nonconforming use throughout the lapse period. The property had been used as a group home since prior to the enactment of the Town's zoning law. When the use lapsed for more than a year, the Court enforced a discontinuance provision identical to the Croton provision, even though the property owner had tried to secure a tenant who would continue to operate a group home.

> Although the petitioner intended to obtain a tenant who would continue the group home use and made several efforts in that regard, it was unable to secure any such tenant, with the result that for a period of more than one year the property was not used as a group home. Thus, there was a clear cessation of the prior nonconforming use, and the petitioner's efforts at securing a new tenant, which merely evinced an intent to continue the use, did not

> confer a right to continue the nonconforming use after the one-year period lapsed.

282 A.D.2d at 612, 723 N.Y.S.2d at 241.

In Village of Waterford v. Amna Enterprises, Inc., 27 A.D.3d 1044, 812 N.Y.S.2d 169 (3d Dep't 2006), the subject gas station closed in 2002 and, in January 2004, Amna bought it and began selling gas. The Village sought an injunction on the grounds that the property had lost its nonconforming use status because the gas station had closed for more than 12 months. The property owner submitted evidence that the previous owner had been trying to sell the property as a gas station during that 12 month period, but the Court was not persuaded. "[E]vidence that [the previous owner] had been marketing the property for sale during the relevant time period did not confer a right to continue the nonconforming use after the 12-month period had lapsed." 27 A.D.3d at 1046, 812 N.Y.S.2d at 170.

Thus, even if Greentree and NIR had "done all that is possible to resume the nonconforming use within the one year statutory period" (Steinmetz Aff. ¶ 17) – which, as shown below, they did not – those efforts would not be sufficient to insulate them from the Croton-on-Hudson discontinuance provision. The Croton statute is clear, and established New York case law supports, that where the nonconforming use ceases for 12 months, the right to continue the nonconforming use is lost.

In any event, it is not true that Greentree and NIR did "all that is possible to resume the nonconforming use." While they may have done all that is possible to

avoid the Village's zoning law – by NIR's attempting to get a railroad exemption from the federal Surface Transportation Board (STB) even though it is clearly not a railroad, and then by securing an upstate railroad to front its C&DD operation at the site – they failed to take the one action that would have allowed their special permit to be processed – *i.e.*, to apply for one in a timely fashion. Filing for a special permit less than two months prior to the end of the discontinuance period, during the middle of the summer, when the Village's boards are on reduced schedules, is a far cry from "all that is possible to resume the nonconforming use."

Greentree and NIR knew as far back as August 2005 that the Village's position and the Court's position was that a special permit was required for another company to operate a C&DD transfer station at 1A Croton Point Avenue. Had they applied for the special permit back then, they would not have been faced with the "loudly ticking" statutory clock and the "appointed time fast approaching." (Steinmetz Aff. ¶ 8) For whatever reason, NIR and Greentree made a calculated choice not to file a timely application and must live with the consequences of that calculation.

NIR and Greentree's "excuse" for not filing for a special permit sooner, that it did not close on the sale of Metro Enviro Transfer, LLC until February 2006 (Steinmetz Aff. ¶ 19, 23-24), is preposterous. It is beyond dispute that NIR knew as early as July 2005 that it intended to operate a C&DD facility at 1A Croton Point Avenue. On July 29, 2005, NIR stated in a notice it filed with the STB that it had reached an agreement with Allied Waste to acquire ownership of Metro Enviro

Transfer, LLC, including its lease with Greentree of 1A Croton Point Avenue. And, in September 2005, NIR applied to the Westchester County Solid Waste Commission for a license to operate a C&DD facility at 1A Croton Point Avenue. Greentree, as the property owner, and/or NIR as the contract vendee/lessee, could have applied for the special permit concurrently with the other steps they were taking to start up C&DD operations in the Village.

Greentree and NIR's repeated arguments about losing valuable property rights and "a truly unique land use right" are tautological. The loss of certain property rights – and, by definition, unique land use rights – is part and parcel of the discontinuance of any nonconforming use. Sun Oil and Amna were losing their rights to operate a gas station on their property; Vite was losing its right to operate a group home; Spicer was losing its right to operate a tavern, and so on. The same argument, that the enforcement of a discontinuance period for a nonconforming use results in a loss of property rights, was rejected in the earliest cases on this question. In Sun Oil Company v. Board of Zoning Appeals of the Town of Harrison, the property owner challenged a discontinuance period as confiscatory. The Court of Appeals rejected the argument and held that the discontinuance provision "does not prevent petitioner 'from using his property for any purpose for which it is reasonably adapted.'" 57 A.D.2d at 628, 393 N.Y.S.2d at 762, affirmed, 44 N.Y.2d 995, 408 N.Y.S.2d 502. Similarly, Croton-on-Hudson's discontinuance provision does not prevent Greentree from leasing its property for one of the many uses permitted in the Village's Light Industrial LI zoning

district.

In conclusion, under well established New York law, there is no grounds for tolling Croton-on-Hudson's statutory discontinuance period for nonconforming uses.

POINT II

THE CASES RELIED ON BY GREENTREE AND NIR DO NOT SUPPORT THEIR MOTION TO TOLL THE STATUTORY DISCONTINUANCE PERIOD.

The cases Greentree and NIR rely on in making their argument that the statutory discontinuance period should be tolled fall into four categories, none of which applies to the Greentree/NIR situation.

The first set of cases, Two Wheel Corp. v. Fagiola, Incorporated Village of Ocean Beach v. Stein, and Bogey's Emporium v. City of White Plains, involved municipalities that thwarted – even illegally – property owners' attempts to get whatever permit or license would have allowed them to resume their discontinued nonconforming use. They are nothing like the instant case, in which the sole reason the "statutory time clock [is] loudly ticking" is that Greentree and NIR did not apply for the special permit until the eleventh hour, or, more precisely, the eleventh month.

In Two Wheel Corp., the Court denied summary judgment because there was a

question of fact as to whether the property owner's "failure to resume its nonconforming use of the subject premises within the six-month period . . . was caused by *unlawful* acts of the defendant village taken to frustrate such timely resumption." 96 A.D.2d 1098, 1098, 467 N.Y.S.2d 66, 67 (2d Dep't 1983).

In Ocean Beach, a contract lessee was forced by village officials, in an improper campaign to prevent him from getting a liquor license, to waive his right to have dancing at his new restaurant and bar. (Dancing was allowed at the previous establishment.) When the lessee subsequently sought to have dancing, the village ruled that dancing was a nonconforming use that was discontinued for longer than the statutory period. Under these circumstances, the Court refused to include in the statutory discontinuance period time lost "because [of] the 'unlawful acts of the * * * village taken to frustrate such timely resumption' of a nonconforming use." 110 A.D.2d 820, 822, 488 N.Y.S.2d 239, 241 (2d Dep't 1985).

The opinion in Bogey's Emporium does not include any details of the City's actions in holding up the applicant's cabaret license. It merely holds that the City could not rely on the six-month statutory discontinuance period when it was the City's "own retention of the application which prevented resumption of cabaret activity within six months." 114 A.D.2d 363, 363, 493 N.Y.S.2d 880, 881 (2d Dep't 1985).

Greentree and NIR attempt to fit this case into the fact patterns of Two Wheel, Ocean Beach, and Bogey's Emporium by making unsupported and untrue statements that the "Village has intentionally and deliberately prevented Movants from" restarting

the use and that it is the "fault of the Village, not the Movants" that they have not received a special permit. (Steinmetz Aff. ¶¶ 2, 3, 29, 31) As this Court is aware, the preliminary injunction it issued was not to prohibit C&DD operations altogether. Rather, it was an injunction against "operating a transfer station at the Property without first obtaining a special permit in accordance with the Village's Zoning Code." Decision of Justice Nicolai dated April 25, 2006, at 4.[2] The sole cause for the delay in the issuance of NIR's special permit is that Greentree and NIR did not apply for a special permit until less than two months before the one-year discontinuance period expires, and almost a full year after NIR agreed to purchase Metro Enviro.

The second category of non-supportive cases, 149 Fifth Avenue Corp. v. Chin and Hoffman v. Board of Zoning and Appeals, were cases in which the nonconforming use was forced to lapse for reasons beyond the property owner's control and the

2. In this context, it is important to realize that the United States District Court's June 12, 2006 preliminary injunction was not issued because of any improper action taken by the Village. It was issued because, subsequent to the Village's commencing eminent domain proceedings, a railroad seeking to front NIR's C&DD operation at 1A Croton Point Avenue subleased the site and brought an action in federal court claiming, in essence, that the Village could not condemn railroad property. It is also critical to recognize that the only party prevented from accepting solid waste under the District Court's preliminary injunction is Buffalo Southern Railroad. Greentree and NIR are not parties to that suit.

property owner promptly and diligently attempted to remedy the situation. Neither element exists in the case at bar.

In 149 Fifth Avenue, the City mandated an inspection and repairs on a building facade, which required the removal of a nonconforming sign. The building owner "diligently completed" the repairs, but it took 27 months to finish them and the nonconforming discontinuance period was 24 months. The Court ruled that where "interruption of a protected nonconforming use is compelled by legally mandated, duly permitted and diligently completed repairs, the nonconforming use may not be deemed to have 'discontinued.'" 305 A.D.2d 194, 194-95, 759 N.Y.S.2d 455, 455 (1st Dep't 2003). The Greentree/NIR situation is critically distinguishable in two important respects. First, Greentree's nonconforming use was terminated on the basis of "overwhelming proof" of persistent substantial violations of the special permit by Greentree's lessee, not because of any action by the Village. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 239-40, 800 N.Y.S.2d 535, 536-37 (2005). Second, Greentree and its new tenant did not "diligently" seek a special permit.

In Hoffman, a nonconforming restaurant was partially destroyed by fire and the property owner obtained a building permit and began reconstruction immediately. It completed the work within the time required by the building permit, and the Village issued a certificate of occupancy. Neighboring property owners sought to vacate the C of O, but both the Village Zoning Board and the Appellate Division ruled that the restaurant use was not discontinued merely because food was not being served. 155

A.D.2d 600, 600, 547 N.Y.S.2d 657, 658 (2d Dep't 1990).

Greentree and NIR try to fit their motion into the rule of these cases by making the tortured argument that the court order closing the Metro Enviro facility was akin to "a situation involving a repair, a fire, or other circumstances beyond one's control." (Steinmetz Aff. ¶¶ 37-38) Even if the closing of Metro Enviro were beyond NIR's control (although it was clearly not beyond Greentree's), that would have no bearing on whether NIR could have applied for a special permit upon reaching the agreement to buy Metro Enviro's assets (in July 2005), or at least when this Court indicated that a new special permit would be required (on August 25, 2005). The application for a special permit was entirely within NIR and Greentree's control and indisputably was not made diligently.

The third category of cases discussed in David Steinmetz's Affirmation involve tolling statutory time frames in other contexts, such as tenant evictions, statutes of limitation, and liens during bankruptcy proceedings. Those cases and the statutes upon which they are decided are irrelevant to, and have never been relied on in, cases applying a nonconforming use discontinuance statute.

Finally, in obvious recognition of the absence of New York authority for their motion to toll the discontinuance period, Greentree and NIR rely on cases from other jurisdictions and "equitable principles." Neither source of authority is at all persuasive when there is settled and plentiful New York case law on the issue of the discontinuance of nonconforming uses. Case law from sister states is "of limited

relevance," especially when there is New York law on the precise question. See, e.g., People v. Watt, 84 N.Y.2d 948, 951, 620 N.Y.S.2d 817, 819 (1994) (decisions from foreign jurisdictions are "of limited relevance in New York cases"); Suffolk Housing Services v. Town of Brookhaven, 109 A.D.2d 323, 331, 491 N.Y.S.2d 396, 402 (2d Dep't 1985).

Similarly, as stated expressly in the cases quoted by Greentree and NIR, the courts look to general principles of equity when "there is no precedent for the precise relief sought." London v. Joslovitz, 279 A.D. 280, 110 N.Y.S.2d 58 (3d Dep't 1952). "Equity will adapt established rules to any situations and grant relief even though a case is novel and there is no precise precedent for the relief to be granted . . . ." New York & Brooklyn Suburban Inv. Co. v. Leeds, 100 Misc. 2d 1079, 420 N.Y.S.2d 639, 647 (Sup. Ct. Suffolk County 1979). (Steinmetz Aff. ¶¶ 46-48)

This Court need not look to equity to establish a rule for the instant case because, as discussed above, there is a substantial body of Court of Appeals and Appellate Division case law upholding and enforcing statutes providing that nonconforming uses discontinued for a certain time period may not be resumed.

Conclusion

Because there is no legal basis for NIR's and Greentree's request to toll the Croton-on-Hudson 12-month discontinuance of a nonconforming use provision, their application should be denied in all respects, and the Village should be awarded costs

and such other relief as the Court deems appropriate.

Dated: Tarrytown, New York
July 17, 2006

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